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Ohio v. American Express: Misunderstanding Two-Sided Platforms, the Charge Card 'Market,' and the Need for Procompetitive Justifications

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By Jeffrey L. Harrison*

I. INTRODUCTION

In *Ohio v. American Express Co.*,[1] the Supreme Court of the United States had its first knowing encounter with what it incorrectly viewed as a two-sided platform[2] in the context of American Express's Non-Disclosure Provisions (NDP).[3] Under these provisions, merchants accepting the American Express card for payment are not permitted to inform consumers that other cards charge merchants less for their use and that this could be reflected in the final price paid.[4] The opinion includes poor reasoning, a lack of attention to precedent, and bad news for those who thought antitrust law was due for a revival.[5] Yet, and perhaps surprisingly, the outcome may be correct.

Part II of this Article briefly summarizes the antitrust landscape to provide an understanding of where the practices of American Express fit.

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1. 138 S. Ct. 2274 (2018).
2. *See infra* discussion at notes 26–34.
3. These provisions prohibited merchants who accepted the American Express card from informing customers that other cards charged a lower user fee. *Am. Express Co.*, 138 S. Ct. at 2280.
4. Specifically excluded by the NDP was discounting the purchase price based on using a less expensive card. United States v. Am. Express Co., 88 F. Supp. 3d 143, 165 (E.D.N.Y. 2015).
5. *See infra* discussion at Part V.

Part III discusses the two-sided market issue generally and how it was treated in *American Express* specifically. That Part includes an explanation of why what was involved in *American Express* was actually a one-sided market that had been segmented in the interests of price discrimination. In fact, American Express and its competitors sell a single product to one group of customers: the right to delay payment to purchasers of goods and services. Part IV makes the point that the American Express system shares characteristics of tying, resale price maintenance, and exclusive dealing.[6] That Part also claims that the NDP share none of the qualities that frequently make those practices lawful. American Express's activity skirted the edges of several vertical restraints, and its underlying character restricted interbrand competition. Part V includes general observations about the case and suggests the outcome may be correct, but the reasoning employed to get there is troublesome in that it continues the trend of minimizing the importance of antitrust law.

Two observations—perhaps assumptions—underlie much of this analysis. The first, I think, is not controversial. Charge card companies often require an upfront yearly fee,[7] and they also derive revenue as a percentage of the sale made using the card.[8] This superficially seems like a charge to the merchant, and it is, but only if narrowly construed. The transaction charge is no different from any other cost of production. Thus, transaction-by-transaction charges are accounted for, as much as possible, in the cost of the product. It is true that it may not be completely passed through to consumers. That will depend on the elasticity of demand faced by the merchant.[9] Nevertheless, the idea that the merchant is a customer that ultimately pays the entire transaction cost fee is an oversimplification.[10]

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6. In fact, the Court ignored its own holdings with respect to tying. *See infra* text accompanying notes 68–74.

7. Some do not charge a yearly fee. This does not alter the analysis to follow.

8. In the case of true credit cards, income is earned by charging interest on the outstanding balance.

9. Elasticity refers to the responsiveness of buyers to changes in price. If demand is inelastic, most or all of the transaction charge will be passed through. If demand is elastic it will be more difficult to pass through the charge. The point is not that the entire transaction fee is always passed on, but to the extent it is, the notion of merchants as buyers seems imprecise.

10. Support for the notion that merchants pass on the transaction cost is the fact that some merchants were evidently willing to lower prices when lower-cost cards were used. This is inferred from the fact that American Express specifically prohibited discounting. *Am. Express Co.*, 88 F. Supp. 3d at 165. In addition, merchants are sometimes willing to offer a discount for cash payments. *Id.*

The second point is perhaps more controversial. Throughout the history of the *American Express* litigation, American Express and other charge card companies were described as competing for merchants to accept their cards.[11] This raises the question of what it means to compete. In its strongest form, competition has an exclusivity element to it. If you buy a Ford, you are not buying a Chevrolet. If you choose one brand of toothbrush, you are not buying another. This is not the case when it comes to merchants and charge cards. First, they do not buy the cards; they agree to accept them. Second, they can agree to accept multiple cards. The real competition in the credit card world is for consumers to enroll in various credit card programs and to actually use the card in making purchases. This is not to say that card companies do not want their cards accepted by as many merchants as possible, but the idea of "competition" in this context is different from those circumstances in which a sale by one seller means a lost sale to another.

II. THE CONTEXT

As those involved in antitrust know, there are two types of agreements to which the antitrust laws apply.[12] One is an agreement between competitors selling products that are good substitutes for each other. These are horizontal agreements and some of them are *per se* unlawful.[13] Both the majority and dissent in *American Express* recognized that case as not involving a horizontal agreement.[14] As this analysis demonstrates, however, the impact on competition was horizontal or interbrand in nature.

The second type of agreement is vertical in that it involves two firms in the chain of distribution. They could be a manufacturer and a retailer or any seller to a reseller. There is an important distinction to be made within the category of vertical agreements. Some of these agreements decrease *intrabrand*, and others decrease *interbrand* competition. As an example of the former, the manufacturer of automobiles may assign geographic areas to each dealership to ensure they do not compete with

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11. *See Am. Express Co.*, 138 S. Ct. at 2281; United States v. Am. Express Co., 838 F.3d 179, 190 (2d Cir. 2015); *Am. Express Co.*, 88 F. Supp. 3d at 158.

12. Agreements that restrain competition are unlawful under section 1 of the Sherman Act. 15 U.S.C. § 1 (1999).

13. This means that an actual anticompetitive effect need not be demonstrated. Even in these cases, though, a defendant may successfully argue that the net effect of an otherwise *per se* unlawful agreement is to increase competition. If so, the standard shifts to the rule of reason. *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85 (1984); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1984).

14. *See Am. Express Co.*, 138 S. Ct. at 2284, 2297.

each other.[15] The idea is to give each dealership the maximum incentive to compete against other brands. To understand why, imagine two dealerships that are close to each other—Dealer *A* and Dealer *B*. Dealer *A* may not advertise the brand it sells in hopes that Dealer *B* will promote the brand and Dealer *A* will benefit. In other words, Dealer *A* may attempt to free ride. Dealer *B* may adopt the same strategy with the outcome that the brand is advertised very little to the disadvantage of the dealership but, more importantly, to the manufacturer's effort to compete against other makers of automobiles.

For this analysis, the more important intrabrand restraint is on price—resale price maintenance. For 100 years, resale price maintenance was *per se* unlawful.[16] The standard was changed to the rule of reason based on the logic that sellers may want to limit price competition when they believe other forms of competition—quality and service—are more effective in their interbrand competitive efforts. Generally, the sacrifice of intrabrand competition, in order to advance interbrand competition, is found to be legal.[17] Nevertheless, it will be argued below that the NDP have an impact similar to resale price maintenance without any offsetting, procompetitive benefits.[18]

Other vertical agreements directly restrain some interbrand competition in hopes of increasing other forms of interbrand competition.[19] Because the weighing is of opposite interbrand effects, these agreements are more suspect than those that directly affect intrabrand competition. The NDP in *American Express* directly affected interbrand competition.[20] Some interbrand restraints have only a minor anticompetitive impact and may, on balance, be squared with increasing overall interbrand competition. Ideally, those that are condemned are those in which the negative interbrand effects are more pronounced than the positive interbrand effects.

For example, a manufacturer of a brand of automobiles may prohibit its dealerships from buying and reselling all or some other brands of

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15. The rule of reason of this practice was established in *Continental Television, Inc. v. GTE Sylvania*, 433 U.S. 36, 46 (1977).

16. The long-standing rule was changed from *per se* unlawful to the rule-of-reason standard in 2007. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

17. *See generally* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009); Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229 (2005).

18. *See infra* Part IV.B.

19. *See* E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 248 (6th ed. 2014).

20. *Am. Express Co.*, 88 F. Supp. 3d at 208.

automobiles. These are called exclusive dealerships and operate like requirements contracts. The dealership must buy all of its cars from one manufacturer. This forecloses other manufacturers from selling to that dealership but can be explained by the same argument as in the interbrand and intrabrand cases. The manufacturers may heavily promote a particular brand; but, once the customer is on the premises, the dealer may attempt to sell another brand that is presumably more profitable. In effect, rather than free ride on other dealers, as in the interbrand and intrabrand example, the dealership free rides on the manufacturer. The anticompetitive effects are not that serious unless a particular manufacturer has imposed this requirement on a substantial share of possible dealers. If so, the costs of entering the market increases to new competitors and the net effect is anticompetitive.[21]

The other principal vertical interbrand restraint is tying. Tying occurs when a seller will only sell one product if the buyer also buys another product. Obviously, the seller must possess market power with respect to one product if that seller can force the buyer to also purchase a second product. In antitrust parlance, the product in which there is market power is called the tying product, and the one attached to it or forced on the buyer is the tied product. The law on tying is not entirely clear. If one had to state a black letter rule, it would be that tying is unlawful if the tying firm sells two products, possesses market power in the tying product market, and forces buyers to purchase a substantial dollar volume of the tied product.[22] As of this writing, the soft *per se* test of tying seems to prevail, but the drift seems to be toward a rule-of-reason approach.[23] The harm in a tying case is to consumers who are forced to buy a product or a brand they do not prefer and to competitors who sell only the tied product.

In *American Express*, the Court applied the standard rule-of-reason analysis.[24] In most cases, the plaintiff's obligation is to define the market and demonstrate the anticompetitive impact of the practice in question. This market definition requirement is waived if the negative competitive effects can be directly shown.[25] If successful, the burden then shifts to the

21. SULLIVAN & HARRISON, *supra* note 19, at 250; *see* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Standard Oil Co. v. United States, 337 U.S. 293 (1949).

22. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992).

23. For a discussion, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 447–48 (4th ed. 2011); SULLIVAN & HARRISON, *supra* note 19, at 271–73.

24. 138 S. Ct. at 2284.

25. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); Todd v. Exxon Corp., 275 F.3d 191, 206–07 (2d Cir. 2001). In dicta, the majority in *American Express* rejects the notion that the definition could be dispensed within cases involving vertical restraints. *Am. Express Co.*, 138 S. Ct. at 2285 n.7.

defendant to demonstrate that the procompetitive effects are stronger than the anticompetitive effects. If the defendant is successful, the plaintiff then has an opportunity to show that the same procompetitive outcome could be achieved by less anticompetitive means.

It is argued below, among other things, that the practices in *American Express* are similar to exclusive dealing, tying, and resale price maintenance, and that interbrand competition is restricted without any offsetting procompetitive effects. For now, though, this Article turns to the first step in the rule-of-reason analysis—market definition.

III. MARKET DEFINITION IN *AMERICAN EXPRESS*

A. The Two-Sided Market Problem Generally

The Court in *American Express* regarded itself as dealing with a two-sided platform.[26] These are firms that sell in two markets.[27] There have been various efforts to define when a firm operates a two-sided platform, but the basics are fairly simple in that the firm sells two products to two different groups, and the attractiveness to each group depends on the usual factors—price, quality, and so forth—plus the level of sales to the other group.[28] There are many examples of firms operating two-sided platforms, including Uber; Ebay; Open Table; Scholastica; self-publishing companies; real estate listing services; and, according to the Court (arguably incorrectly), credit card companies.[29]

In a two-sided market, the demand for product *A* depends not just on the price charged in market *A* but on the demand for market *B*. Additionally, demand in market *B* will depend on price in market *B* and the demand in market *A*. Rochet and Tirole offer the example of video games.[30] People want to buy gaming platforms that have many games. Those who produce the games themselves want to write programs for platforms that have many owners.[31] Evans and Schmalensee use the

26. *Am. Express Co.*, 138 S. Ct. at 2297.

27. *See generally* David Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667 (2005); Patrick Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHI. L. REV. 2059 (2017).

28. It may be that the price to one side of the market is zero, but the demand even at that price will still be determined by the demand on the other side of the market.

29. *See infra* text at notes 62–66.

30. Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003).

31. *Id.*

example of Open Table, an online reservation system.[32] Restaurants find it more attractive to be listed as a participating restaurant if there are many diners using the service. The number of diners using the service depends on the number and variety of restaurants listed.[33] The Court in *American Express*, as well as others, held that credit cards constitute a two-sided market.[34] Consumers will be attracted to cards that are accepted by a large number of merchants, and merchants are more likely to accept cards that are possessed by many consumers.

The problem arises when a firm takes what is arguably anticompetitive action in market *A* that causes demand to increase in market *B*. Market *A*'s customers may be worse off, and, examined alone, the practice might be condemned. On the other hand, the practice could make customers in market *B* better off. Now the issue arises of how to define the market, a process that is required in all but a few categories of antitrust cases. Should the relevant market be the one directly affected, or should there be an effort to define the market so that it includes consideration of the net pro or anticompetitive effects?

B. Market Definition in American Express

As noted, American Express required merchants accepting its card to agree to its Non-Discrimination Provisions.[35] Under these provisions, merchants were not permitted to do any of the following: "(1) offer[] customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) express[] preferences for any card, or (3) disclos[e] information about the costs of different cards to merchants who accept them."[36] The trial court and the appellate court agreed that American Express operated in a two-sided market.[37] These two sides were "a market for card issuance, in which Amex and Discover compete with thousands of Visa- and MasterCard-issuing banks; and a network services market, in which Visa, MasterCard, Amex, and Discover compete to sell acceptance services."[38] In this case, the second market denoted "competition" for merchants to accept the various cards.

32. David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, *in* 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 404, 409 (Roger D. Blair & D. Daniel Sokol eds., 2014).

33. *Id.*

34. *Am. Express Co.*, 138 S. Ct. at 2280; *see also* Evans & Schmalensee, *supra* note 32; Rochet & Tirole, *supra* note 30.

35. *Am. Express Co.*, 838 F.3d at 191.

36. *Id.* at 184.

37. *Id.* at 185; *Am. Express Co.*, 88 F. Supp. 3d at 151.

38. *Am. Express Co.*, 838 F.3d at 192; *see also Am. Express Co.*, 88 F. Supp. 3d at 151.

The trial court found that the relevant market was for "network services," that American Express possessed market power in the relevant market, and that the NDP had a negative effect on interbrand competition.[39] According to the court, "American Express's ability to impose significant price increases . . . between 2005 and 2010 without any meaningful . . . attrition is compelling evidence of . . . power in the network services market."[40]

The United States Court of Appeals for the Second Circuit reversed on the basis of the market definition.[41] It adopted the view that the relevant market was composed of both sales of the cards to cardholders *and* competition among card companies for merchants to accept payment cards.[42] One side of the market depended on the charge to merchants when the card was used. The other side depended on the net charge to cardholders when the card was issued. This latter cost has two components, one is the actual issuing fee; the other is rewards which offset the issuing fee. According to the court, American Express could increase the number of cardholders by lowering the cost of issuing the card *or* by offering more generous rewards.[43] The court further reasoned that if merchants were insensitive to an increase in fees at the point of the sale, as the trial court found, that might not be the result of market power.[44] Instead, it could be the result of American Express making its card more attractive to cardholders by decreasing enrollment fees or increasing rewards. This made the card more attractive to consumers, which, in turn, made accepting the card more attractive to merchants.[45]

The Supreme Court of the United States, with Justice Thomas writing for a 5–4 majority, affirmed the decision of the Second Circuit.[46] Like the Second Circuit, Justice Thomas reasoned that the actual market was neither composed of merchants alone nor cardholders alone.[47] Instead, the market centered around transactions.[48] According to Justice Thomas, "[F]or credit cards, the network can sell its services only if a merchant and a cardholder both simultaneously choose to use the network."[49] In

39. *Am. Express Co.*, 88 F. Supp. 3d at 151.
40. *Id.* at 188.
41. *Am. Express Co.*, 838 F.3d at 197.
42. *Id.* at 196–97.
43. *Id.* at 200.
44. *Id.* at 202–03.
45. *Id.* at 203.
46. *Am. Express Co.*, 138 S. Ct. at 2290.
47. *Id.* at 2280.
48. *Id.*
49. *Id.* at 2286.

effect, the majority viewed the product sold to merchants and the product sold to cardholders as the same based on the number of "transactions."[50] Justice Thomas distinguished the case of credit cards from that of newspapers.[51] Newspapers are, in a sense, two-sided platforms in that they sell to readers and to advertisers. Advertisers will pay more depending on the number of likely readers. He reasoned, however, that readers were largely unconcerned with the quantity of advertising.[52] In short, the demand for newspapers is independent of the amount of advertising contained.[53] This indicates that a critical element in determining whether the market definition must encompass the platform as a whole is the interdependence of the two products. Just how strong that interdependence must be is left undetermined.

Although technically the decision was based solely on the failure by plaintiffs to properly define the market, there appears to be an underlying rationale of protecting interbrand competition. In this regard, Justice Thomas's reasoning seems irreconcilable with the very basics of antitrust policy. According to Justice Thomas, if a merchant is permitted to suggest a lower cost alternative, the consumer may feel the card is unwelcome.[54] This could affect the reputation of the card more generally and undermine its competitiveness in the market for cardholders. The essence of the argument is that giving cardholders more information at the point of the transaction with a merchant could make American Express unable to compete with other charge cards.

Justice Thomas's rationale seems to be that American Express has chosen to compete in the market for cards by offering greater rewards. It cannot do this if faced with greater competition with respect to fees charged at the point of sale. It is hard to distinguish this from an argument that to subsidize its competitive efforts in the card market, American Express must be permitted to retard competition at the point of sale. This misses two points. First, if American Express cannot be viable in the card market without the NDP, the competitive solution is to change its strategy. Second, as discussed below, both charges are ultimately to the cardholder, and the total cost of the card is a

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50. *Id.* at 2287.

51. *Id.* at 2286.

52. *Id.*

53. This may be true in the traditional sense of newspapers, but there exist a wide variety of newspaper-like publications in which the relationship between the two products—advertising and access to advertisements—fits the description of a two-sided market.

54. *Am. Express Co.*, 138 S. Ct. at 2289.

combination of the two types of payments.[55] The NDP created a barrier to allowing cardholders to react to the total charge.

Justice Breyer wrote the opinion for the four dissenters. He took a practical view and asked how the decision to treat a two-sided market as a single market was useful with respect to the purpose of market definitions in antitrust cases.[56] He noted that two-sided platforms have four characteristics: "(1) [they] offer different products or services, (2) to different groups of customers, (3) whom the 'platform' connects, (4) in simultaneous transactions."[57]

Justice Breyer went on to note that the first two characteristics hardly called for a special market definition given that many firms sell two or more products to two or more groups of customers.[58] He also argued that firms connecting two groups of customers who make simultaneous transactions are commonplace and gave the examples of farmers' markets and travel agents.[59] He concluded, "[N]othing in antitrust law . . . suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches."[60]

C. American Express: Price Discrimination in a Single Market

American Express and other credit card companies have devised a clever system to promote price discrimination, which the Supreme Court did not recognize.[61] The first step in understanding this is to note that American Express is not a two-platform system. American Express, like all charge card companies, sells a single product to consumers—convenient, delayed payment opportunities. The revenue it generates comes from cardholders, first in the form of yearly enrollment fees for the cards, then as a per-use fee based on the percentage of the amount charged.[62] Rewards programs are simply discounts from these two types of charges. Competition among companies is for consumers to become their cardholders and, more importantly, to use the cards.

Obviously, firms that practice price discrimination find it more profitable to charge different prices to different groups of consumers or

55. *See infra* text accompanying notes 60–68.

56. *Am. Express Co.*, 138 S. Ct. at 2297 (Breyer, J., dissenting).

57. *Id.* at 2298.

58. *Id.*

59. *Id.* at 2299.

60. *Id.*

61. *Id.* at 2283 (majority opinion).

62. Purchase of the card itself and then the use of the card are regarded as "two moments of truth" in the industry. *Am. Express Co.*, 88 F. Supp. 3d at 162.

individuals as opposed to a single price for all. The key is to charge a higher price to those willing to pay a higher price and to charge a lower price to those only willing to pay a lower price (as long as that lower price is above cost). A good example is movie theaters. They could set a price of $10 for all times and groups. The problem is that some people with inelastic demand curves might be willing to pay more. On the other hand, some other groups—students and the elderly—may not be willing and able to pay $10, but they would still pay a price that is above the theater's cost. As long as students and the elderly cannot resell their tickets to those who would be willing and able to pay more, the two-price system will be more profitable than the one-price system. The same is true for airlines that may charge less for those who have flexible schedules as opposed to business travel, which is likely to be less flexible and harder to plan in advance. In an ideal world, from the seller's point of view, it would be best to charge each person a different price based on his or her willingness to pay.[63]

In the case of charge cards, it would be possible to sell the cards for one flat fee and allow buyers to use them on an unlimited basis. That price would be acceptable to some, particularly those who plan to make frequent use of the card, but too high for others who see themselves as rarely using the card. A better outcome is to gauge how important the card is to different people and accordingly charge different prices to different groups. This is accomplished through a flat fee minus rewards, plus a percentage based on the prices of items acquired by using the card. Again, this is not a two-platform market, but a single market with discriminatory pricing.[64]

It is not clear that price discrimination, as practiced by American Express, should be illegal. In some cases, price discrimination does harm competition.[65] For example, a firm might sell to a large reseller at one price and a small reseller at another price making it impossible for the smaller competitor to survive.[66] To some extent, price discrimination as practiced by American Express may mean increased output as opposed

63. This would be called "perfect price discrimination."

64. American Express also discriminates based on the type of merchant. *Am. Express Co.*, 88 F. Supp. 3d at 159.

65. It does, however, mean that consumer surplus is converted to producers' surplus. *See* SULLIVAN & HARRISON, *supra* note 19, at 418. In the past some forms of price discrimination were unlawful under the Robinson-Patman Act. 15 U.S.C. § 13(1) (2018). In recent years, the reach of the Act has been greatly reduced. SULLIVAN & HARRISON, *supra* note 19, at 413–43. The Act applies to "commodities" and would not apply to the practices of American Express in any case.

66. The original intent of the Robinson-Patman Act was to avoid this type of outcome. SULLIVAN & HARRISON, *supra* note 19, at 420.

to the outcome if there were one high and flat fee for the card. Given the possibility that price discrimination as practiced by American Express is actually welfare increasing, the question is whether NDP are necessary to achieve this end. Obviously, nothing about them facilitates welfare enhancing price discrimination. This leaves open the issue of whether they should be found to be unlawful on other bases.

IV. NDP AS A VERTICAL RESTRAINT

In practice, the NDP resemble a number of questionable practices described at the outset of this discussion. They can be viewed as leading to tying-like effects, resale price maintenance, and exclusive dealing. Each of these is examined below. The critical question is whether any of the procompetitive rationales for allowing these restraints to exist apply in the case of American Express. They do not.

A. Passive Tying

It is important to recall that tying has an impact on both competitors selling the tied product and on customers who are forced to make choices they would not make in absence of the tie. Although not tying in the traditional sense, the NDP have the same effect. Possessing the card does not mean one must use it, but the NDP make it more likely that a consumer will use it. In fact, buyers who possess the card, if given full information about the cost per transaction, which ultimately is reflected in the price paid for goods and services, may choose to use a card that results in lower costs.[67] At the point of purchase, the transaction cost to the consumer of knowing the cost of the alternatives is high. Yet, for the merchant it is zero, and divulging the information would make one party, maybe both, better off. The tie results because the lower-cost provider of information is prohibited from providing it. It is true that this may make American Express worse off, but this is a problem only if we want to reward American Express for avoiding competition on the merits.

An example may be useful. Suppose the customer approaches the cashier with a $1000 television. If the American Express card is used, the merchant pays $40 to American Express. If another card is used, the cost to the merchant might be $20, and the merchant may be willing to lower the price of the television to $990 if that alternative card is used. If the customer opts for the lower price, both the merchant and the customer are better off. The customer technically still has the choice of the lower- or higher-cost card but is more or less locked into the American Express

67. They may still choose to use the card because they prefer the points as opposed to a possibly lower price.

card, unless he or she can be made aware of the benefits of switching to an alternative to American Express. Those costs of acquiring that information could be eliminated on the spot by the merchant providing the information that would allow the consumer to make the choice. Granted, there is no "forcing" as required in an ordinary tying arrangement, but ultimately, all ties are the result of raising the cost to buyers making a different decision, and the NDP do exactly that.

This idea of a transaction-cost-based tie is well-traveled ground by the Supreme Court. In *Eastman Kodak Co. v. Image Technical Services*,[68] the defendant sold copying machines. It did not possess market power in the copying machine market. It also made replacement parts available but did not sell them to independent service organizations.[69] This made it difficult for independent service organizations to compete with Kodak's servicing. The plaintiffs—independent service organizations—claimed that Kodak had tied parts and services. The parts were the tying product, which, if desired, had to be purchased along with Kodak's service. The defendants argued that it could not have power in the parts market because it did not possess market power in the photocopier market.[70] In more general terms, it could not have power in the aftermarket for parts if it did not possess power in the primary market. The reasoning was that customers could switch to other copiers if they were dissatisfied with Kodak's service.[71] The Supreme Court rejected this argument based on a transaction-costs analysis.[72] In order for the defendant's theory to work, buyers of the photocopying machines would have to engage in life-cycle pricing at the outset, meaning that they would purchase based on the cost of the machine, including servicing over its lifetime.[73] Or, when they became dissatisfied with Kodak's service they would have to absorb switching costs.[74] Both options entailed transaction costs associated with gathering information.

In *American Express*, people paid a flat fee to possess a charge card, and, when they presented it, they were charged on a per-use basis. But for the transaction cost of knowing that the use of another card could be less expensive to them or the merchant, some customers are likely to switch. If the same practice in *American Express* were at issue in the photocopier case, it would be comparable to Kodak purposely concealing

68. 504 U.S. 451 (1992).
69. *Id.* at 458.
70. *Id.* at 460.
71. *Id.* at 465–66.
72. *Id.* at 470–71.
73. *Id.* at 473.
74. *Id.* at 476.

the information necessary to make life-cycle price calculations or to accurately determine switching costs.

Again, the tying-like character involved in *American Express* does not meet all of the technical requirements of a successful tying claim. People who present their American Express cards at the point of sale do not experience a sense of being forced to make a decision to use the American Express card—possessing the card does not mean it must be used. On the other hand, the NDP cleverly shelters them from information that would make alternative cards more attractive. In short, American Express can charge merchants, and thus, the purchasers to whom the costs are passed on, more than other cards, because, as in *Eastman Kodak Co.*, information about alternatives is unobtainable.

If the NDP result in a soft or passive tie, it is instructive to explore whether their imposition can be supported by the arguments made for not finding tying unlawful. One argument is that very often what appears to be two products should be viewed as one for antitrust purposes. Selling the two products together is more efficient and likely to lead to lower prices for consumers.[75] An additional important argument is that tying cannot lead to increased monopoly profits. This does not mean it is not more profitable, but that whatever profits are increased cannot be traced to possession of power in the tying product. This is sometimes called the single monopoly profit theory.[76] The idea is that a seller who possesses market power in one market can simply raise the price of the product and reap any possible monopoly prices. If consumers are forced to buy a product as a condition of getting the product in which there is market power, it is comparable to raising the price of the tying product above the profit-maximizing price.[77] Thus, whatever the impact on consumers of the tying arrangement, it cannot be that it increases monopoly profit.[78] In the case of American Express, neither of these justifications hold. There is no basis to believe that acquiring the card and using it is more or less efficient than using any other card or paying cash. In addition, the subtle tie advances the goal of price discrimination, and this does increase monopoly profits.

75. This economically oriented approach to determining whether one or two products are involved is an important element of the dissent in *Jefferson Parrish Hospital v. Hyde*, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring).

76. *See generally* Dennis W. Carlton & Michael Waldman, *Robert Bork's Contribution to Antitrust Perspectives on Tying Behavior*, 57 J.L. & ECON. S121 (2004); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

77. *Hyde*, 466 U.S. at 35–36.

78. This changes if the tying firm is able to establish market power in the tied-product market.

B. NDP as Resale Price Maintenance

American Express's practice also bears a resemblance to resale price maintenance but with a kicker. Typically, resale maintenance prevents a reseller from selling the relevant product at below what the manufacturer has indicated. When a transaction involves the use of a charge card, the cardholder buys three items: a good or a service, possible rewards, and the option to delay payment. The cost of the second and third items are covered by the 4% charge by American Express, which is technically paid by the merchant but almost certainly passed on to the consumer, as much as possible, like any other cost. American Express fixes the price of selling the delayed payment, an element of the product. The kicker is that the merchant is not only prevented from lowering the 4% charge for delayed payment, but they may not suggest a lower cost alternative.

To understand how this works, in a typical case of resale price maintenance, a retailer may not be permitted to lower the price of a product—say a television—to which the manufacturer has affixed a minimum price. Nevertheless, nothing about the resale price maintenance prevents the retailer from carrying a competing line of televisions and showing those competing products to the consumer. Thus, in the usual case, resale price maintenance means the seller will not be undercut by a seller of the *same* brand. In *American Express*, the impact is much more serious. It limits competition not just among those merchants accepting the American Express card, but it limits interbrand competition among all cards as well.

For example, suppose the seller of televisions in the example above carries televisions with warranties of varying lengths. Suppose further that a manufacturer of a specific brand of televisions decides its principal sales strategy is to offer a two-year warranty. It sets the resale price at $1000, which reflects the warranty and that the reseller need not worry about price competition of competing sellers of that brand of television. Other manufacturers offer a one-year warranty, and the retail price—whether fixed or not—is lower. The consumer can choose one or the other, and the practice of fixing the resale price of the televisions with a two-year warranty reflects the judgment of the manufacturer that competition on warranty length is more productive than price competition. The NDP of American Express are comparable to restricting the store to selling only two-year-warranty televisions. Rather than restrict intrabrand competition, it crosses over to interbrand competition.

Based on his reasoning in *American Express*, Justice Thomas might respond to this line of reasoning by making the point that restricting merchants from carrying televisions with less than a two-year warranty increases the prospects for the manufacturer. It does not do this by convincing customers that the two-year warranty is worth it. Instead, it does so by requiring the merchant to raise the transaction costs to consumers who now must go to other stores to make comparisons. Similarly, if American Express experiences interbrand success, it is not on the merits of a superior rewards program. It is because it has been permitted to raise the transaction cost of finding lower prices. In fact, Justice Thomas's use of an increase in interbrand competition as a justification falls well short of making economic sense. He is really writing about the survival of American Express and the protection of a competitor as opposed to competition. This protection comes at a cost to cardholders. In fact, what he seems to support is actually a subsidy from cardholders to American Express. The broader point is that whatever the procompetitive justifications for resale price maintenance, they do not apply to the NDP.

C. NDP as Exclusive Dealing

As noted in Part II, exclusive dealing occurs when a manufacturer requires its resellers to deal only in products of that manufacturer. As with the above analysis of tying, the activity of American Express does not quite fit the model but indirectly has an exclusive dealing-like effect. Obviously, American Express does not require merchants who accept the American Express card not to accept any others, at least initially. Nevertheless, once a buyer pulls his or her American Express card out of a wallet or purse, the merchant (who again is selling, along with the product, the opportunity for delayed payment) becomes, at that point, an exclusive dealer. Again, using the analogy to a storeowner selling various brands of televisions, the NDP are comparable to a requirement that once a consumer has shown an interest in one brand of television, the store owner is prevented from showing a lower cost alternative.

The principal anticompetitive impact of exclusive dealing is that the manufacturer may foreclose other manufacturers from access to resellers, and thus, raise entry costs. The principal procompetitive argument is that it promotes interbrand competition. The idea is that if the reseller is restricted to one brand, it will make its best efforts to promote and sell that brand. In addition, it limits free riding by the reseller on the manufacturer's interbrand promotional efforts.[79] Like tying, exclusive dealing limits interbrand competition, and this limitation is supposedly offset by increased interbrand competition.

79. The danger is that the manufacturer's advertising would attract the consumer to a store carrying that brand. The reseller would then switch the consumer to another brand.

In the context of NDP, this rationale makes little sense. In the case of American Express, the anticompetitive effects of exclusive dealing at the transactional level would have to be offset by greater competition with respect to market for enrollment in card programs. The problem is that card enrollment is based on the net cost of the card—enrollment fee *minus* rewards. Rewards, though, are based on card usage. Since rewards are simply a discount from the price of the card, what the prospective cardholder receives is largely determined by how much the card is used, which, in turn, is determined by the cardholder. The idea that less competition in one interbrand market creates more competition in another interbrand market makes little sense when the buyer's own actions determine how attractive the interbrand market is.

V. CONCLUDING REMARKS

The discussion above demonstrates that the market at issue in *American Express* was not two sided. This one-sided market was composed of the sale of or enrollment in credit card programs and per-transaction user fees, both ultimately paid for by consumers. It illustrates that American Express and other charge card companies engage in price discrimination. Although price discrimination can increase overall welfare, the NDP are unnecessary to achieve that end. It also shows that the NDP have a negative impact similar to tying, resale price maintenance, and exclusive dealing. On the other hand, they share none of the competition-enhancing effects of those restraints.

Both the majority and dissent in *American Express* misconstrued the market as two sided. If the market had been defined correctly, the issue would have been whether American Express possessed market power in the credit card market with the focus solely on users of the card and revenue generated by the sale and use of the cards. This would have been determined by assessing the total revenue from all sources generated by American Express cards as a percentage of revenue generated by all charge cards. To be clear, there are certain things this is not. For example, the majority notes that Visa and MasterCard account for 432 million cards and American Express only 53 million.[80] Although this

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80. *Am. Express Co.*, 138 S. Ct. at 2282. The number of cards in circulation appears to depend on who you ask. One source puts the total number of cards at 633 million with American Express issuing 47.5 million. Alina Comoreanu, *Market Share by Credit Card Network*, WALLETHUB (Mar. 7, 2017), https://wallethub.com/edu/market-share-by-credit-card-network/25531/. Another source put the total number of American Express cards at 54.9 million with the total for the U.S. at 500 million. But this did not include the number of Discover Cards, which, based on the first source listed above, was around 50 million. Tamara E. Holmes, *Credit Card Market Share Statistics*, CREDIT CARDS,

seems to be inconsistent with market power, it does not account for actual revenue generated and, appropriately, the majority does not use it as an indicator of market power. The problem is that American Express's low proportion of cards will be offset by their higher price, both for enrolling and per transaction. Also not a true measure of market power, as the majority suggests, is the volume of transactions.[81] Some cards may consistently generate more revenue per transaction than others and this seems likely to be the case with American Express. One other measure that would not capture market share is "credit purchase volume."[82] How *much* people actually spend using credits cards is not a measure of sales of a specific credit card.[83] Similarly, simply examining the number of times American Express raised merchant fees is not, as the dissent argues, an indicator of market power.[84] Raising merchant fees might be offset by increasing rewards, meaning the actual impact that using the card has on price is unknown. In fact, unless this researcher has misinterpreted the various descriptions given by the courts, including the Supreme Court, it is not obvious that a correct market share was ever generated.

Consequently, the result in *American Express* may or may not be correct. As already noted, there are many aspects of the NDP that are anticompetitive, and there appear to be no procompetitive justifications. Without a correct assessment of market power, it cannot be determined if these practices actually harmed competition. Nevertheless, suppose the outcome is correct; is there anything to concern those interested in a strong antitrust policy? In fact, correct outcomes justified by poor reasoning may be just as troublesome as wrong outcomes. This is true of the majority opinion in *American Express*. For example, in a footnote, Justice Thomas attempts to make the already difficult path for the plaintiffs in vertical-restraints cases even steeper.[85] It has been standard antitrust law that one could demonstrate market power by defining the market and determining the defendant's market share; or, power could be shown directly by showing the defendant has done things that could

https://www.creditcards.com/credit-card-news/market-share-statistics.php#5-visa-2014 (last visited Sept. 26, 2018).

81. *Am. Express Co.*, 138 S. Ct. at 2286.

82. *See* Holmes, *supra* note 80.

83. One source indicates that American Express has 23% of network purchase volume. Comoreanu, *supra* note 80.

84. *See Am. Express Co.*, 138 S. Ct. at 2296–97 (Breyer, J., dissenting). In addition, in dissent, Justice Breyer mistakenly assumes that a customer is billed for the price of "goods and services." *Id.* at 2291. In fact, the customer's bill also reflects some, or the entire, transaction fee.

85. *Id.* at 2285 n.7 (majority opinion).

only be accomplished if it had market power.[86] For reasons evidently unrelated to the issue of market power as perceived in the case, Justice Thomas wrote that the direct proof of market power is not available in cases involving vertical restraints because "[v]ertical restraints often pose no risk to competition."[87] The logic of his approach is not evident. The market power step is but one in the analysis of vertical restraints. Even if relying on direct evidence of anticompetitive effects were a mistake, a court still must weigh any anticompetitive effects against procompetitive justifications. In short, the risk of what is known in antitrust as "false positive" is minimal.[88]

More worrisome is Justice Thomas's view of what makes markets more competitive. He writes that a merchant trying to switch the customers to a lower-cost card will make those customers feel unwelcome.[89] Unwelcomeness means a loss of customers and the possible eventual collapse of American Express.[90] This house of cards rests on two shaky assumptions. The first is the very awkward proposition that people will be offended if informed that a lower cost may be available or that they can lower the costs to the merchant by using a different card. For the most part, one of the underlying assumptions of antitrust and economics is generally that, all other factors held equal, buyers prefer lower prices. Even if the price of the good being purchased is not lower, there is no good reason to believe that buyers desire to run up the costs of sellers. The second, as already noted, is that the antitrust law protects competitors and not competition, when just the opposite is true.[91] This suggests a serious misunderstanding of antitrust law or a continuation of the shift in the law to weaken antitrust enforcement.

86. *Id.* at 2284.

87. *Id.* at 2285 n.7.

88. A false positive occurs when a practice is condemned under the antitrust law that actually did not have a negative effect on competition.

89. *Am. Express Co.*, 138 S. Ct. at 2289–90.

90. The theory is that having switched away from American Express at one merchant, the cardholder may do the same at others even if not encouraged to do so. *American Express Co.*, 88 F. Supp. 3d at 155.

91. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990). This point is made by Justice Breyer in dissent. *Am. Express Co.*, 138 S. Ct. at 2303 (Breyer, J., dissenting).